No. 82-1846

In the Supreme Court of the United States

OCTOBER TERM, 1983

RONALD W. ANDREWS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General
D. LOWELL JENSEN
Assistant Attorney General
CAROLYN L. GAINES
Attorney
Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether an indictment against a physician for unlawfully dispensing and distributing controlled substances, in violation of 21 U.S.C. 841(a)(1), must include an allegation that the conduct complained of was not in the usual course of a professional medical practice.

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OPINION BELOW

The judgment order of the court of appeals (Pet. App. A4-A5) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on March 14, 1983 (Pet. App. A5). A petition for rehearing was denied on April 7, 1983 (Pet. App. A6). The petition for a writ of certiorari was filed on May 13, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioner was convicted on nine counts of dispensing controlled substances, in violation of 21 U.S.C. 841(a)(1). He was sentenced to concurrent terms of three years' imprisonment, to be followed by two years' special parole on five of the counts. Petitioner's sentence on the

other four counts was suspended and he was placed on three years' probation, to be served consecutively to the prison and special parole terms. The court of appeals affirmed (Pet. App. A4-A5).

1. The evidence at trial showed that in August 1980, Domenic Deodati, a state undercover narcotics agent, initiated an investigation into the activities of petitioner, a licensed physician, with respect to violations of state and federal drug laws. On August 14, 1980, Deodati went to petitioner's office and requested a prescription for quaalude (C.A. App. 81a).[1] Petitioner responded by telling Deodati that the DEA had warned petitioner that he was writing too many prescriptions for quaalude and suggested that he could give Deodati a prescription for seconal or dalmane to help him with any sleeping problems he might be experiencing (*ibid.*). Deodati agreed, and petitioner, without taking any medical history or performing any physical examination, gave Deodati a prescription for 50 seconal tablets and charged him $15 (*id.* at 84a, 85a).

During the next six months Deodati visited petitioner a total of 10 times, obtaining more than two dozen prescriptions for seconal, desoxin, quaalude and tussionex.[2] Petitioner never examined Deodati or discussed any treatment of any medical condition; moreover, petitioner charged him by the number of prescriptions, *i.e.*, two prescriptions were charged as two office visits (C.A. App. 91a). On several occasions, petitioner made comments to Deodati indicating his awareness that Deodati was not personally using the prescriptions (C.A. App. 103a, 107a, 123a). Indeed, during a visit on

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[1] "C.A. App." refers to the supplemental appendix filed by the United States in the court of appeals.

[2] Quaalude is a sedative hypnotic with the same effect as a barbiturate (C.A. App. 527a). Seconal is a barbiturate, desoxin is a stimulant, and tussionex is a cough syrup that contains a potent narcotic (*id.* at 519a-522a, 530a-532a, 533a).

November 6, 1980, Deodati requested a prescription for quaalude because it "sold better on the street," and petitioner issued the prescription (*id.* at 117a).

On November 10, 1980, a second agent, Esther Kiah, also visited petitioner and introduced herself as Deodati's friend (C.A. App. 385a). She asked for quaalude, which petitioner prescribed for her. He also gave her a prescription for dalmane, but told her to use different pharmacies for each prescription (*id.* at 388a). Petitioner charged Kiah $25 for the "visit" (*id.* at 389a).

During the next four months, Kiah returned to petitioner's office three more times and obtained several prescriptions for quaalude, valium and dalmane (C.A. App. 391a, 393a, 403a, 413a-414a). Petitioner never discussed any form of treatment with regard to any of the drugs he prescribed for Kiah and never gave her a physical examination or even took a medical history of her (*id.* at 429a, 431a).

Petitioner was indicted on 31 counts charging that he "knowingly and intentionally did unlawfully dispense and distribute" specific drugs on specific dates (C.A. App. 7a-31a). Although there was no allegation in the indictment that petitioner was not acting in the ordinary course of his medical practice, petitioner never moved to dismiss the indictment on the basis of this omission. In the instructions to the jury, the district court explained that one of the elements the government was required to prove beyond a reasonable doubt was that petitioner acted "other than for a legitimate medical purpose and that he did so outside of the course of his professional practice, and not * * * [to] provid[e] medication for a patient['s] welfare, needs or medical needs" (C.A. App. 753a).

2. The court of appeals affirmed (Pet. App. A4-A5). In so doing, it merely noted that petitioner challenged the adequacy of his indictment for failure "to allege the drugs were dispensed with a lack of legitimate medical

purpose or outside the course of his professional practice" (*id.* at A4).

ARGUMENT

Petitioner argues (Pet. 5-8) that where, as here, the defendant in a prosecution under 21 U.S.C. 841(a)(1) is a physician, the "[absence] of a legitimate medical reason" is an element of the offense, and, accordingly, the failure to allege it in the indictment violates the Fifth Amendment due process right to be apprised of the specific crime charged and the right to be indicted by a grand jury. Petitioner's contention was properly rejected by the court of appeals.

It is settled that "an indictment or other pleading founded on a general provision defining the elements of an offense, or of a right conferred, need not negative the matter of an exception made by a proviso or other distinct clause, whether in the same section or elsewhere, and that it is incumbent on one who relies on such an exception to set it up and establish it." *McKelvey* v. *United States*, 260 U.S. 353, 357 (1922). With respect to the general provision of 21 U.S.C. 841, this Court observed in *United States* v. *Moore*, 423 U.S. 122, 131 (1975), that "[b]y its terms § 841 reaches 'any person.' It does not exempt (as it could have) 'all registrants' or 'all persons registered under this Act.'" Thus, any exceptions provided by the Controlled Substances Act, 21 U.S.C. (& Supp. V) 801 *et seq.*, must be raised on an individual basis by the defendant seeking its benefit and need not be alleged in the indictment.[3] Indeed, 21 U.S.C. 885(a)(1), explicitly states that "[i]t shall not be necessary for the United States to negative an ex-

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[3] Of course, once a defendant has satisfied his burden of going forward with sufficient evidence to raise a factual issue as to whether an exception applies, the burden shifts to the government to prove the inapplicability of the exception beyond a reasonable doubt.

emption or exception set forth in this subchapter in any complaint, information [or] indictment * * * and the burden of going forward with the evidence with respect to any such exemption or exception shall be upon the person claiming its benefit." Accordingly, most courts have held that it is unnecessary to allege the absence of medical justification in an indictment charging a violation of 21 U.S.C. 841(a)(1). See Pet. App. A4-A5; *United States* v. *Seelig*, 622 F.2d 207, 211-212 (6th Cir. 1980); *United States* v. *Roya*, 574 F.2d 386 (7th Cir. 1978).

Petitioner points out (Pet. 6), however, that two other courts of appeals have decided that failure to allege the absence of any medical justification renders defective an indictment against a physician charging a violation of Section 841(a)(1). See *United States* v. *Outler*, 659 F.2d 1306 (5th Cir. 1981); *United States* v. *King*, 587 F.2d 956 (9th Cir. 1978). The inconsistency with the decision below does not, however, make this case a worthy candidate for review by this Court. First, there is at least some doubt whether the Fifth and Ninth Circuits would decide this case differently from the court below. In *King*, a divided court held, as an alternative ground, that the indictment was defective; the court also held that the conviction had to be reversed for failure to instruct the jury properly. 587 F.2d at 965-966. Thus, the court was not required to decide whether the deficiency in the indictment would, by itself, warrant reversal. Although the court in *Outler* did clearly hold that the deficiency in the indictment alone constituted reversable error, a different panel of that court, in *United States* v. *Jackson*, 576 F.2d 46, 48 n.4 (5th Cir. 1978), while leaving the issue open, noted that generally the government need not allege the absence of an exception and that medical justification is clearly an exception to Section 841(a)(1). While these considerations did not ultimately persuade the panel in *Outler*, their discussion in *Jackson* suggests that the final word in

that circuit on this issue may not yet have been written.[4]

Moreover, there is another crucial distinction between this case and *Outler* and *King*: petitioner never challenged the sufficiency of his indictment in the district court. Thus, he cannot raise the sufficiency of the indictment issue directly; his indictment, even if defective, should be upheld unless it was so defective that by no reasonable construction could it be said to charge the offense for which petitioner was convicted. *United States* v. *Czeck*, 671 F.2d 1195, 1197 (8th Cir. 1982). The allegation that petitioner did "unlawfully dispense" controlled substances adequately indicated that petitioner's conduct was for an illegal purpose. Thus, the indictment can reasonably be construed to charge petitioner with acting outside the scope of his medical authority. See *United States* v. *King*, 587 F.2d 956, 966 (9th Cir. 1978) (Choy, J., dissenting). There is no reason to suppose that a defendant who failed to raise this issue in a timely fashion would be able to secure a reversal of his conviction in either the Fifth or Ninth Circuit.

Finally, even if there is a conflict in the circuits on this issue, it plainly is not one that affects significantly the administration of criminal justice. The "defect" in the indictment does not impair any substantial rights of

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[4] The court in *Jackson* upheld the conviction based on an indictment that did "not state that Dr. Jackson acted outside the scope of professional practice" (576 F.2d at 48); instead, it simply alleged that he unlawfully dispensed drugs "'under the guise and artifice of operating' his clinic," which the court held was sufficient.

Although there is a clear tension between *Outler* and *Jackson*, the United States did not seek rehearing en banc in *Outler* because the technical pleading requirement, even if unnecessary, did not involve an issue that was deemed important enough to justify en banc consideration, since the panel's decision did not impose any serious obstacle to law enforcement.

the defendant; it is a technical omission. This case is a good illustration of the point. Each count in petitioner's indictment clearly set forth the statutory elements of the offense, as well as the date of the offense, the quantity and description of the controlled substance, and a citation to the statute violated. Since the indictment contained the elements of the offense charged, it fairly informed petitioner of the charge against which he had to defend, and enabled him to plead his conviction in bar of future prosecutions for the same offense; accordingly, the indictment plainly satisfied due process. *Hamling* v. *United States*, 418 U.S. 87, 117 (1974). Moreover, the allegation that petitioner "unlawfully" dispensed drugs, renders wholly fanciful petitioner's claim that the grand jury could have indicted under the misimpression that petitioner could be prosecuted under this statute simply as a physician writing prescriptions in the ordinary course of his practice.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General
D. LOWELL JENSEN
Assistant Attorney General
CAROLYN L. GAINES
Attorney

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